A

Bounty Dynamics Sdn Bhd (formerly known as Media Development Sdn Bhd) v Chow Tat Ming & 175 Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2133 OF 2011
MOHAMAD ARIFF, ABANG ISKANDAR AND UMI KALTHUM JJCA
15 OCTOBER 2015

C

Civil Procedure — Limitation of action — Contract — Whether trial judge wrong not to have considered limitation issue raised in defence just because it was not an agreed issue for trial — Whether fact limitation pleaded and raised during trial and in submissions of parties made it part of the issues at trial — Whether framing of agreed issues at case management merely to facilitate trial process and not to be in the nature of pleadings — Whether plaintiffs' claims time barred — Limitation Act 1953 s 6(1)(a)

D

E

Contract — Misrepresentation — Sale and purchase of property — Whether pre-contractual representations by developer that business complex would have various attractive facilities mere 'puffs' and invitations to treat — Whether sale and purchase agreements showed developer was to merely provide space for carrying out of various business activities and not to operate them itself — Whether representations by developer not binding promises but innocent misrepresentations at most — Whether trial judge wrong to have granted damages for both misrepresentation and breach of contract

F

G

The respondents, comprising individuals and companies, had separately signed sale and purchase agreements ('SPAs') with the appellant between the years 1994 and 1995 to buy commercial units in a business complex ('the complex') built by the appellant. The respondents alleged that in an advertisement brochure published by the appellant and distributed prior to the execution of the SPAs, the appellant represented that the complex would have

H

festive and promotional activities throughout the year, an anchor tenant of reputable standing, a twin-level amusement theme park and a food court. Layout plans of the amusement theme park, restaurants and entertainment outlets were not only contained in the brochure but were annexed in a schedule to the relevant SPAs. The respondents claimed they were induced by the

I

representations and layout plans in the brochure to enter into the SPAs. The appellant carried out various festive and promotional activities at the complex, secured tenants to run the theme park (which tenancy was terminated in 2001) and the food court and also secured an anchor tenant for the complex. In 2004, the respondents wrote to the appellant to remedy its failure to construct the

theme park and to reactivate the food court which had ceased to operate. Claiming that the appellant failed to accede to those requests, the respondents filed two actions in the High Court – one on 16 February 2005 and the other on 7 April 2006 – for misrepresentation and breach of contract and claimed damages for losses they had suffered. Pursuant to cll 21 and 22 of the SPAs, the appellant issued notices dated 31 December 2007 to the respondents to take delivery of vacant possession of their respective units. About a month earlier to that date, the appellant sold the complex to a third party. The High Court granted judgment to the respondents holding that the representations made by the appellant became a term of the SPAs and that in not fulfilling them the appellant was in breach of contract. The High Court also held that the respondents had proven the damages they had suffered and damages for misrepresentation and for breach of contract were ordered to be assessed by the registrar. Although the appellant pleaded limitation in its defence, the issue was not included in the agreed issues for trial but it was raised during the trial and in the submissions of the parties. In the instant appeal against the decision, the appellant argued that the trial judge's absolute failure to consider the limitation issue was a gross misdirection as that issue alone would have determined the two suits.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) The respondents' claims were time barred under s 6(1)(a) of the Limitation Act 1953. Being founded in contract, the principle of law was that a claim for breach of contract had to be commenced at the earliest possible time when the innocent party became aware of the breach. In the context of a sale and purchase of property in a development, the critical date was the date of delivery of vacant possession as defined in the relevant sale and purchase contract. Delivery of vacant possession took place when all the requirements for such delivery as stipulated in the agreement were fulfilled. It did not necessarily have to be on the date of issuance of the certificate of fitness. It would have become apparent to the respondents at the date of delivery of vacant possession whether or not the food court and/or the theme park had been constructed. The date of delivery of vacant possession was 31 December 1997. For purposes of limitation, the cut-off date was 31 December 2003 (see paras 20–21 & 26–27).

(2) Although limitation was not an issue that was expressly included in the agreed issues for trial, it was pleaded in the appellant's defence and was raised in the course of trial and in the submissions of both parties. In such circumstances, the issue of limitation became part of the issues at the trial. The framing of agreed issues during case management was to facilitate the trial process; agreed issues were not in the nature of pleadings. Since both parties departed from the agreed issues, the issue of limitation became relevant for appreciation and evaluation by the trial judge. By not

addressing this important issue, there was manifest non-direction on a critical aspect by the trial judge. It was a glaring error of law founded on a clear misdirection which invited appellate intervention (see para 19).

(3) Looking at the character of the representations made by the appellant, it showed that the appellant was to provide space instead of itself constructing and/or operating a theme park or food court. In the SPAs, the appellant was not described as a theme park or food court operator but as a vendor which constructed a commercial complex and sold commercial units. It followed that any statement as to 'theme park', 'bowling', 'cine', 'KTV', 'restaurant' in a floor plan ordinarily and naturally meant that this was the space provided for such activity and not that the appellant itself had to operate that business activity. On the facts, there was in fact a food court in existence. There was also a tenancy with Roxy Leisure Sdn Bhd to operate the theme park but by mutual consent of the parties, because of the prevailing economic conditions, the tenancy was terminated early. The appellant had also secured an anchor tenant in Fajar Retail Enterprise Sdn Bhd in 2002 (see paras 33–35).

(4) On the facts and the law, there was no firm promise by the appellant to construct the food court and the theme park and to ensure that they would continue to exist no matter what the economic circumstances were. The trial court failed to evaluate an exemption clause in the advertisement brochure which again was an error of law that invited appellate intervention. In view of the existence of the exemption clause, the representations made should be read as mere 'puffs' and not as binding promises. At most, they were in the nature of an invitation to treat (see paras 41–42).

(5) On the facts, there was no evidence of deceit or fraudulent misrepresentation but only a case of innocent misrepresentation for which no damages was claimable. The SPAs were fully executed and the properties delivered (see paras 43–44).

(6) There were elements of duplicity in the order on damages granted by the trial judge. A plaintiff, in law, had to decide whether he was pursuing a claim for misrepresentation or for breach of contract. He was not entitled to be awarded damages for both. Once a representation became a clause in the contract, such as was argued here by the respondents, there could not then be an order for damages to be assessed for both misrepresentation and breach of contract (see para 50).

[Bahasa Malaysia summary

Responden-responden, yang terdiri daripada individu dan syarikat, telah secara berasingan menandatangani perjanjian jual beli ('PJB') dengan perayu antara tahun 1994 dan 1995 untuk membeli unit komersil dalam dupleks perniagaan ('kompleks') yang dibina oleh perayu. Responden-responden

mendakwa bahawa dalam risalah iklan yang dicetak oleh perayu dan disebarkan sebelum pelaksanaan PJB, perayu memaklumkan bahawa kompleks akan mempunyai aktiviti dan promosi yang meriah sepanjang tahun, penyewa utama yang berwibawa, satu tingkat-berkembar taman tema dan medan selera. Pelan reka bentuk taman tema, restoran dan pusat-pusat hiburan bukan sahaja terkandung dalam risalah tetapi juga dilampirkan dalam jadual PJB yang relevan. Responden-responden mendakwa bahawa mereka terdorong oleh representasi dan reka bentuk dalam risalah untuk memasuki PJB. Perayu mengadakan pelbagai aktiviti dan promosi meriah di kompleks, mendapatkan penyewa untuk menguruskan taman tema (yang mana sewanya tamat pada 2001) dan medan selera dan juga berjaya mendapatkan penyewa utama bagi kompleks. Pada 2004, responden-responden memaklumkan perayu untuk meremedikan kegagalannya membina taman tema dan mengaktifkan semula medan selera yang tidak beroperasi. Mendakwa bahawa perayu gagal memenuhi permintaan tersebut, responden memfailkan dua tindakan di Mahkamah Tinggi – satu pada 16 Februari 2005 dan satu lagi pada 7 April 2006 – bagi salah nyata dan pelanggaran perjanjian dan menuntut ganti rugi bagi kerugian yang mereka alami. Menurut klausa 21 dan 22 PJB, perayu mengeluarkan notis bertarikh 31 Disember 2007 kepada responden untuk mengambil milikan kosong unit masing-masing. Kira-kira sebulan sebelum tarikh itu, perayu menjual kompleks tersebut kepada pihak ketiga. Mahkamah Tinggi memberikan penghakiman kepada responden, memutuskan bahawa representasi yang dibuat oleh perayu menjadi tempoh PJB dan bahawa dalam tidak memenuhinya, perayu melanggar kontrak. Mahkamah Tinggi juga memutuskan bahawa responden membuktikan kerugian yang mereka alami dan ganti rugi bagi salah nyataan dan untuk pelanggaran kontrak diarahkan untuk ditaksir oleh pendaftar. Walaupun perayu memplidkan had masa dalam pembelaannya, isu tersebut tidak termasuk dalam isu-isu yang dipersetujui untuk perbicaraan tetapi dibangkitkan semasa perbicaraan dan hujahan pihak-pihak. Dalam rayuan terhadap keputusan tersebut, perayu menghujahkan bahawa kegagalan mutlak hakim bicara untuk mempertimbangkan isu had merupakan salah arah besar kerana isu tersebut sahaja akan memutuskan dua guaman.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Tuntutan responden terhalang oleh had masa di bawah s 6(1)(a) Akta Had Masa 1953. Ditubuhkan oleh kontrak, prinsip undang-undang adalah bahawa tuntutan pelanggaran kontrak terpaksa dimulakan seawal mungkin apabila pihak yang tidak bersalah menyedari berlakunya pelanggaran. Dalam konteks jual beli hartanah pembangunan, tarikh kritikal adalah tarikh serahan milikan kosong seperti yang ditakrifkan dalam kontrak jual beli berkaitan. Serahan milikan kosong berlaku ketika semua keperluan untuk penghantaran seperti yang dinyatakan dalam

perjanjian dipenuhi. Ia tidak semestinya berlaku semasa tarikh pengeluaran sijil layak menduduki. Menjadi jelas buat responden pada tarikh serahan milikan kosong sama ada atau tidak medan selera dan/atau taman tema telah dibina. Tarikh serahan milikan kosong adalah 31 Disember 1997. Bagi maksud had masa, tarikh akhir adalah 31 Disember 2003 (lihat perenggan 20–21 & 26–27).

(2) Walaupun had masa bukan isu yang nyata termasuk dalam isu-isu yang disetujui untuk dibicarakan, diplidkan dalam pembelaan perayu dan dibangkitkan semasa perbicaraan dan hujahan kedua-dua pihak. Dalam keadaan itu, isu had masa menjadi sebahagian isu dalam perbicaraan. Perangkaan isu-isu disetujui semasa pengurusan kes adalah untuk memudahkan proses perbicaraan; isu-isu yang dipersetujui bukan sifat pliding. Oleh kerana kedua-dua pihak tersimpang daripada isu-isu yang dipersetujui, isu had menjadi relevan untuk pertimbangan dan penilaian oleh hakim bicara. Dengan tidak menangani isu penting ini, berlaku ketidakarahan jelas yang kritikal oleh hakim bicara. Ini satu kesilapan undang-undang ketara berasaskan salah arah jelas yang mewajarkan campur tangan rayuan (lihat perenggan 19).

(3) Melihat sifat representasi yang dibuat oleh perayu, perayu perlu menyediakan ruang dan bukan dengan sendirinya membina dan/atau mengendalikan taman tema atau medan selera. Dalam PJB, perayu tidak digambarkan sebagai taman tema atau pengendali medan selera tetapi sebagai penjual yang membina sebuah kompleks komersil dan menjual unit komersil. Berikutan itu, mana-mana pernyataan tentang 'theme park', 'bowling', 'cine,' KTV, 'restoran' dalam pelan lantai secara biasa dan semula jadinya bermakna ini ruang yang disediakan untuk aktiviti tersebut dan bukan untuk perayu mengendalikan sendiri aktiviti perniagaan. Berdasarkan fakta, sebenarnya wujud sebuah medan selera. Terdapat juga sewaan dengan Roxy Leisure Sdn Bhd untuk menguruskan operasi taman tema tetapi dengan persetujuan bersama pihak-pihak, akibat keadaan ekonomi semasa, sewaan ditamatkan awal. Perayu juga berjaya mendapat penyewa utama di Fajar Retail Enterprise Sdn Bhd pada 2002 (lihat perenggan 33–35).

(4) Berdasarkan fakta dan undang-undang, tiada janji kukuh yang diberi oleh perayu untuk membina medan selera dan taman tema dan untuk memastikan bahawa kedua-duanya terus wujud tidak kira apa jua keadaan ekonomi. Mahkamah perbicaraan gagal menilai fasal pengecualian dalam iklan risalah yang sekali lagi adalah satu kesilapan undang-undang yang mewajarkan campur tangan rayuan. Dengan kewujudan fasal pengecualian, representasi yang dibuat hendaklah dibaca sebagai satu 'puffs' semata-mata dan bukan janji yang mengikat. Paling tidak, kesemuanya bersifat mewajarkan remedi (lihat perenggan 41–42).

(5) Berdasarkan fakta, tiada keterangan penipuan atau penipuan salah nyata tetapi hanya satu kes salah nyataan tidak bersalah yang mana tiada kerosakan boleh dituntut. PJB telah dilaksanakan sepenuhnya dan hartanah telah diserahkan (lihat perenggan 43–44).

(6) Terdapat unsur-unsur pengulangan dalam perintah ganti rugi yang diberikan oleh hakim bicara. Di bawah undang-undang, plaintif perlu memutuskan sama ada dia hendak meneruskan tuntutan terhadap salah nyataan atau kerana melanggar kontrak. Dia tidak berhak ke atas ganti rugi kedua-duanya. Apabila perwakilan menjadi klausa dalam kontrak, seperti dihujahkan oleh responden, tidak boleh ada perintah ganti rugi untuk ditaksir bagi salah nyataan dan pelanggaran kontrak (lihat perenggan 50).]

Notes

For cases on limitation of action in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 6063–6064.

For cases on sale and purchase of property, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6099–6104.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500, CA (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd [2010] MLJU 576; [2010] 7 CLJ 152, CA (distd)

Dato' Badarudin bin Abd Khalid & Ors v MBf Property Services Sdn Bhd & Ors [2011] MLJU 1256, HC (refd)

Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban & Ors [2001] 4 MLJ 49, CA (refd)

Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor [1999] 5 MLJ 670, HC (distd)

Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors [2008] 2 MLJ 256, CA (refd)

Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors [2011] 5 MLJ 913, CA (refd)

Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460, CA (refd)

Legislation referred to

Limitation Act 1953 s 6, 6(1)(a)

Appeal from: Civil Suit Nos S6–22–145 of 2005 and S6–22–308 of 2006 (High Court, Kuala Lumpur)

Lim Chee Wee (Rajvinder Singh, Vincent Lim Seng Liang and Nathalie Ker with him) (Dennis Nik & Wong) for the appellants.

Harpal Singh Grewal (Harwinder Kaur, Julian TL Chan and Reny Rao with him) (AJ Arifin, Yeo & Harpal) for the respondent.

Umi Kalthum JCA:

[1] The appeal is against the decision by the learned judicial commissioner of the High Court dated 28 July 2011 in allowing the respondents' claims for damages with costs. At the High Court the respondents claimed that appellant had breached the terms of the sale and puchase agreements and the respondents suffered damages as a result of misrepresentations made by the appellant.

FACTS

[2] The background facts could be summarised as follows. On or about various dates between the years 1994 and 1995, the respondents executed individual sale and purchase agreements ('SPA') and deed of mutual covenants ('deeds') with the appellant for the purchase of commercial properties ('the said properties') in a commercial complex known as Summit Centre, USJ Persiaran Kewajipan USJ 1, 47600 UEP Subang Jaya, Selangor ('the said complex').

[3] The respondents alleged that by an advertisement brochure published by the appellant and distributed prior to the execution of the SPA ('the said brochure'), the appellant represented that the said complex would have the following:

(a) festive and promotional activities throughout the year;

(b) an anchor tenant of a reputable standing;

(c) a twin level amusement park, parking bays for more than 2,000 vehicles; and

(d) a food court.

[4] Layout plan of the theme park, anchor tenant, restaurants and entertainment outlets was incorporated in the said brochure.

[5] The respondents claimed that relying on the truth of the appellant's

representations in the brochure and believing in the truth of the layout plans in the fourth schedule, the respondents entered into their respective SPAs. Further, several of the respondents who purchased properties located on the second and third floors of the said complex paid premium prices as the food court and twin level amusement park were to be located on these floors.

[6] The respondents also alleged that by several newsletters published by the appellant and distributed to the respondents, that is, in the June 1996, November 1996 and July 1997 newsletters, the appellant made similar representations on the main tenants, theme park and food court. The appellant represented that:

(a) 'the food court and theme park will definitely bring in the crowd, keep them entertained for the whole day and they will surely come back for more';

(b) 'Roxy Leisure will operate the adventure world theme amusement centre, costing approximately RM30m, which offers a wide variety of rides, attractions, inter active games and live entertainment for the whole family';

(c) 'Food City, the food court on Summit's 2nd floor will not only serve a variety of local and international fare, but will do so at the best available prices in a shopping centre';

(d) 'The Roxy Leisure Theme Park with 93,000 sq feet of fun and excitement, will be the biggest indoor theme park in the country'; and

(e) 'Roxy Leisure's 'Adventure World' is an estimated 90,000 sq foot mythical jungle city filled with gnarled trees and strange architecture and carvings. This city is home to 10 major rides, including the first indoor Flume Ride and Super Telecombat. There is also a custom built 'jungle' playground and other fun activities for younger children'.

[7] Pursuant to cll 21 and 22 of the SPA, the appellant delivered to the respondents vacant possession of their properties by issuing the notices for delivery of vacant possession dated 31 December 2007. The appellant at this juncture also applied to Majlis Perbandaran Subang Jaya for the issuance of the certificate of fitness of occupation ('CFO') and obtained the necessary temporary CFOs and the final CFO on 19 June 2002.

[8] When vacant possession was delivered, the theme park had not been

constructed. On 21 June 1999, the respondents' solicitors wrote to the appellant's solicitors that the respondents had entered into the SPA on the appellant's several representations including the theme park which had turned out to be untrue.

[9] The appellant had carried out various festive and promotional activities at the said complex. The appellant had also secured tenants for the said complex, such as, tenancy of the theme park by Roxy Leisure Sdn Bhd which was subsequently terminated on 1 June 2001; tenancy of the food court by Haruman Horizon Sdn Bhd and Nadagaya Sdn Bhd respectively; tenancy of Fajar Retail Enterprise Sdn Bhd.

[10] The respondents wrote to the appellant on 14 May 2004 and 27 October 2004 requesting the appellant's to address its failure to construct the theme park and the removal of the food court and to remedy the same. However, the appellant had not acceded to the respondents' request. The respondents then filed these two actions for misrepresentation and breach of contract. The respondents by these actions were claiming that they had suffered loss and damage as:

(a) their properties have depreciated in value; and

(b) they faced difficulties letting out their properties and those who managed to rent them out were getting low rentals.

[11] On or about 30 November 2007, the appellant sold the said complex to Maybank Trustee Bhd as the Trustee of AmFirst Real Estate Investment Trust.

AT THE HIGH COURT

[12] The learned judicial commissioner (as he then was) ('the JC') allowed the respondents' claims. In arriving at his decision the learned JC found, vis the evidence of DW2, that the brochure was part of the appellant's marketing tools. He also found the depiction of the theme park and food court in the layout plans in the brochure as well as the Fourth Schedule to the SPA. The appellant's witness, DW3, had also confirmed that the appellant was not in the position after 2007 to build the theme park now as the said complex had been sold to Maybank Trustees as the Trustee of AmFirst Real Estate Investment Trust. The learned JC concluded that the representations made by the appellant, which had become a term of the contract, was incapable of being performed by the appellant from its own doing. There was, therefore, a clear breach by the appellant of the SPA.

[13] In arriving at his decision the learned JC applied the decision in *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* [1999] 5 MLJ 670 (HC) in construing whether representations contained in a brochure induced the plaintiff therein to enter into a contractual relationship where it was held that:

> It is time that contracting parties realise that representations contained in brochures ought not to be used as a gimmick to entice innocent parties into a bargain which the contracting party has no intention of honouring. In this case the plaintiff has emphatically maintained that he was induced by this representation to purchase the said unit. I have no hesitation therefore in concluding that the representation made in the brochure did indeed induce the plaintiff to enter into the agreement.
>
> *Recital to the agreement*
>
> I am of the view that my task has been made easier by the fact that the representation as contained in the brochure has in fact been incorporated as Recital C to the said agreement. In construing the terms and conditions of an agreement, the court has to consider the object of the agreement in tandem with the manifest intention of the parties. *Chitty on Contracts* (27th Ed) Vol 1 states at para 13-018 (p 630) as follows:
>
> > Where words of recital or reference manifest a clear intention that the parties should do certain acts, the courts will from these infer a covenant to do such acts, just as if the instrument had contained an express agreement to that effect.
>
> If the defendants had therefore covenanted that they would build six blocks of five to seven storey shop office and service suites then it is my judgment that a breach of such a covenant by the defendants goes to the root of the contract as a clear deviation of the manifest intention and object of the contracting parties.
>
> *Terms of the agreement*
>
> The case for the plaintiff has been made even easier by the fact that what is contained in the brochure and recital has become a term in the agreement.
>
> ...
>
> ln this case no doubt, by refusing to stand by the brochure, recital and terms of the agreement, which clearly stated that the defendants intended to build six blocks of five to seven storey shop office and service suites and substituting the same with three storey shop office with no service suites,the defendants have been in breach of s 40 of the Contracts Act 1950 and the plaintiff is entitled to rescind the agreement since I find that the plaintiff has not either by words or conduct acquiesced in its continuance.

[14] The learned JC found that given the evidence of both the respondents' and appellant's witnesses the respondents were indeed induced into executing the SPAs by the appellant's misrepresentations. The fact that these representations as to the food court and theme park had been depicted and

indentified in the layout plans as approved by the Majlis Perbandaran Subang Jaya ('MPSJ') and incorporated into the SPA through the Fourth Schedule made it a contractual term. And the breach of it would be a breach of the contract. The respondents had also proven damages suffered by them and therefore they were entitled for damages for misrepresentation and breach of contract. The learned JC further ordered that damages to be assessed by the senior assistant registrar.

[15] The appellant appealed against this decision to the Court of Appeal.

THE APPEAL

[16] We heard the appeal on 19 March 2014, 25 April 2014, 19 August 2014 and 7 November 2014. We adjourned the appeal to 21 November 2014 for decision and the broad grounds of judgment was read out by YA Dato' Mohamad Ariff bin Yusof JCA (as he then was). Herewith is our full grounds of judgment wherein it has incorporated the broad grounds so read.

[17] Before the learned JC, parties agreed that the issues to be tried were as follows:

(a) whether there was misrepresentation and breach of contract by the appellant as to the theme park and food court in the SPA, advertisement brochure and the 1996 and 1997 newsletters published by the appellant; and

(b) whether there was depreciation in the value of the respondents' properties due to the alleged misrepresentation and breach of contract as at the date of filing of the writ of summons on 16 February 2005 for Suit No S6–22–145 of 2005 and on 7 April 2006 for Suit No S6–22–308 of 2006; and if so what are the damages suffered by the respondents.

[18] We had considered the submissions by the parties on the facts and the law, particularly in relation to the issue of limitation and the effect of this issue not being included as part of the agreed issues for trial. We had also evaluated and considered the other issues canvassed before us which may be summarised as follows:

(a) whether the respondents had established their case based on misrepresentation and breach of contract by the evidence of only two

unit purchasers as witnesses, although the claim was by 176 unit purchasers;

(b) whether there was an agreement at case management to limit the number of witnesses for the respondents to merely two witnesses;

(c) whether the first respondent had been properly authorised to act for the other 175 respondents by the warrants to Act produced in court at the submission stage in the High Court;

(d) whether there was a material inducement made by the appellant as developer in its advertisement brochure as a pre-contractual document to the respondents as purchasers to build the food court on the second floor of the said complex and the theme park on the third and fourth floors of the said complex;

(e) whether the exemption clause in the brochure was effective in law to exclude liability for misrepresentation;

(f) whether there was a continued misrepresentation in newsletters published to the purchasers after the execution of the SPAs that the food court and the theme park would continue to be built;

(g) whether the respondents had pleaded fraudulent or negligent misrepresentation, or merely innocent misrepresentation, for which no damages were claimable;

(h) whether by selling the said complex (excluding the sold units to purchasers) to Maybank Trustees as Trustee as part of a REITS transaction (AmFirst Real Estate Investment Trust), the appellant had as developer disabled itself in law and in fact from constructing the food court and the theme park, and therefore was in breach of contract;

(i) whether time should run from the date of the sale to Maybank Trustees for purposes of limitation; and

(j) whether the learned JC was correct in law to have ordered general and special damages to be assessed for both misrepresentation and breach of contract.

Whether time should run from the date of the sale to Maybank Trustees for purposes of limitation

[19] The issue on limitation was not at all referred to by the learned JC in his judgment. Although limitation was not an issue expressly included in the agreed issues for trial, this same issue was pleaded in the defence of the appellant, and was raised in the course of the trial and in the submissions of both parties before the learned JC. In these circumstances, we found that this issue had become part of the issues at the trial. The framing of agreed issues

during case management was meant to facilitate the trial process; agreed issues are not in the nature of pleadings. Since both parties had departed from the agreed issues, the issue of limitation became relevant for judicial appreciation and evaluation by the learned JC. Any objection to a departure from agreed issues should have been taken promptly at the point of time it emerged. A similar principle was applied in the context of pleadings in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585. In our view, the same principle should apply here. By not addressing this important issue, we found there had been a manifest non-direction on a critical aspect of the trial by the learned JC. If the respondents' claim was time barred under s 6 of the Limitation Act 1953 (which was the applicable provision), the failure by the trial court to address this issue would be a glaring error of law founded on a clear misdirection, which would invite appellate intervention.

[20] Learned counsel for the appellant submitted that all claims by the respondents were statute barred. This was because the respondents' action against the appellant was based on the various SPAs executed by the respondents' between 1994–1995, therefore the applicable limitation period was six years as stipulated in s 6(1)(a) of the Limitation Act 1953, which reads as follows:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –
>
> (a) actions founded on a contract or on tort;
>
> ...

[21] The appellant submitted the cause of action had accrued on the date of delivery of vacant possession. In respect of the cause of action for misrepresentation, it also accrued from date of delivery of vacant possession. It was submitted that the respondents had pleaded that the appellant made representations in the brochure and newsletter recklessly as the facilities were not provided by the appellant causing the respondents to suffer loss and damage as particularised in para 136 of the statement of claim. The respondents would suffer loss and damage when vacant possession was delivered by the appellant to the respondents pursuant to cll 21 and 22 of the SPA. Delivery of vacant possession took place when all the requirements for delivery of vacant possession as stipulated in the agreement had been fulfilled. It did not necessarily have to be on the date of the issuance of certificate of fitness. In *Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors* [2011] 5 MLJ 913 (CA), the court was of the view that, to constitute an effective delivery of vacant possession, it must be shown that the requirements set out in the sale and

purchase agreement for the manner in which delivery of vacant possession took place had been fulfilled.

[22] Under the SPA, cl 22 provides the manner in which delivery of vacant possession takes place and it has stipulated the following requirements:

> (1) Upon the issuance of a certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and the Purchaser having all monies payable under this Agreement having performed and observed all terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel PROVIDED ALWAYS that such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Parcel is issued.

[23] Learned counsel for the appellant further submitted that the notice of the delivery of vacant possession was on 31 December 1997, vacant possession was delivered on 31 December 1997 whilst the two suits were filed on 16 February 2005 and 7 June 2006, therefore the cause of action would have accrued on 31 December 1997 and the limitation of six years would expire on 31 December 2003. In the circumstances, the two suits were time barred.

[24] Learned counsel for the respondents submitted in reply by stating that the subject matter of the respondents' claim was a future development. The respondents contended that there were no terms in the SPAs which allowed the appellant to take away the theme park and food court as promised in the Fourth Schedule and cl 39 of the SPA. The theme park and the food court were specifically mentioned in the brochures and the SPA. Therefore since the theme park was a future development, there was no time frame set for the respondents to commence the action. Furthermore the issue of limitation was never considered by the learned JC at the High Court. The respondents, in oral submission, further submitted that time should run from the date of the sale of the said complex to Maybank Trustees on 30 December 2007.

[25] We had considered the respondents' argument that the calculation of time should be from the date of the sale of the said complex to Maybank Trustees, that is, 30 December 2007, and thus the suit had been filed within time. The writs of summons and statements of claim were filed on 16 February 2005 (for Suit No S6–22–145 of 2005) and 7 June 2006 (for Suit No S6–22–308 of 2006).

[26] Being a claim founded on contract, the principle of law is that a claim for breach of contract has to be commenced at the earliest possible time when the innocent party becomes aware of the breach. In the context of a sale and purchase of property in a development, the critical date will be the date of

delivery of vacant possession, as defined in the relevant sale and purchase contract. On the facts of this case, it would have become apparent to the purchasers at the date of delivery of vacant possession whether or not the food court and/or the theme park had been constructed. The date of delivery of vacant possession was 31 December 1997. The SPAs had been signed variously between 16 December 1994–22 March 1996. For purposes of limitation, the cut-off date would be 31 December 2003.

[27] We therefore agreed with the submission by the appellant that the claims were time barred. On this ground alone, the appeal should be allowed. We also noted that the fact of the sale of the said complex to Maybank Trustees had not been pleaded by the respondents. The fact that this was a date subsequent to the date of filing of the writs of summons demonstrated that this later date could be a relevant date for purposes of calculating limitation in any event.

Whether by selling the said complex (excluding the sold units to purchasers) to Maybank Trustees as trustee as part of a reits transaction (AmFirst Real Estate Investment Trust), the appellant had as developer disabled itself in law and in fact from constructing the food court and the theme park, and therefore was in breach of contract

[28] We further found that there was nothing in the SPAs to prevent the appellant from entering into the transaction with Maybank Trustees, and no issue of the appellant allegedly escaping its contractual obligations really arose on the facts and the law.

Whether there was a material inducement made by the appellant as developer in its advertisement brochure as a pre-contractual document to the respondents as purchasers to build the food court on the second floor of the said complex and the theme park on the third and fourth floors of the said complex

[29] On this issue, learned counsel for the appellant submitted that the learned JC found the representations made by the appellant on the theme park and food court had become contractual terms on the ground that these representations were incorporated into the SPA by virtue of cl 39 of the SPA. Relying on the same representations, the learned JC found the appellant liable for misrepresentation.

[30] It was submitted that misrepresentation is about the effect of pre-contractual statements and a representation 'is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract' (*Cheshire, Fifoot and Furmston's Law of Contract*, Second Singapore and Malaysian Edition, Butterworths Asia 1998). It followed that a representation cannot be construed as a misrepresentation and a term of contract at the same time and this is established in the following cases.

[31] The Court of Appeal case of *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500, at p 505, was cited by learned counsel for the appellant where Gopal Sri Ram JCA (as he then was) drew a distinction between 'pre-contractual statement' and 'contractual statement'. In his judgment, it was held as follows:

> Since the consequences for a statement made by a party to a contract depends upon the stage at which the statement is made, the law recognises a division between contractual and pre-contractual statements.
>
> Pre-contractual statements are called 'representations'. However, contractual statements are obligations actually undertaken by the party making them. They are referred to by lawyers as 'the terms of a contract.

[32] It was submitted by the appellant that the learned JC relied on the case of *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* to support his finding that there was a breach of contract against the appellant and the Court of Appeal case of *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 7 CLJ 152 to support his finding on misrepresentation against the appellant. However, there was never an issue of misrepresentation raised before the High Court in *Lim Sew Lan*. Similarly, there was never an issue of breach of contract raised before the Court of Appeal in *Balakrishnan a/l Devaraj*. Neither of these two cases dealt with the issue of concurrent claims of misrepresentation and breach of contract.

[33] On the facts, this was not a case of a total absence of the construction and facilitation of the food court and theme park. There was in fact a food court in existence and managed by Haruman Horizon Sdn Bhd and Nadagaya Sdn Bhd. There was also a tenancy entered into with Roxy Leisure Sdn Bhd to operate the theme park, but this was followed by a letter of early termination by Roxy Leisure. On the evidence, the termination was by mutual consent of Roxy Leisure and the appellant because of the prevailing economic condition.

[34] We also noted the appellant had also entered into a tenancy agreement with Fajar Retail Enterprise Sdn Bhd in 2002, with Fajar as an anchor tenant.

[35] Learned counsel for the appellant submitted that there were no misrepresentation as the terms of the SPA and the alleged representations were performed and fulfilled. Looking at the character of representation made by the appellant, it showed that the appellant was to provide space instead of itself constructing and/or operating a theme park or food court. In the SPA the appellant was not being described as a theme park or food court operator, instead it was described as a vendor which constructs a commercial complex and sells commercial units. It therefore followed that any statement as to 'theme park', 'bowling', 'cine', 'KTV', 'restaurant', in a floor plan must ordinarily and naturally mean that this is the space provided for such activity. It cannot be that this means that the appellant must operate this business purposes, for the other simple reason the SPA does not state but the appellant is licenced or has expertise to so operate.

[36] The appellant submitted that the alleged representations were subject to a disclaimer or exemption clause as stated in the brochure, which amounted to an invitation to treat, and authorisation to alter the layout plan under the SPA.

[37] The disclaimer/exemption clause in the brochure upon which the respondents' case relies on has the following disclaimer and exemption clause:

> The information, perspectives and plans contained in this brochure are subject to amendments as may be required by the Authorities and the consultants. All drawings are artist's impression only. While care has been taken in providing this information, the developer cannot be held for any inaccuracies.

[38] The appellant submitted that it was clear from the wording of the exemption clause that it was included in the brochure for the purpose of notifying the general public that the information, perspectives and plans contained in the brochure would be subject to further amendments of which the appellant could not be held liable for.

[39] The respondents attempt to disregard the exemption clause and to hold the appellant liable for the contents of the brochure was an attempt 'to deny the

legitimacy and effectiveness of that exclusion clause for which it was designed (thereby) render it meaningless ...' (per Suriyadi Halim Omar JCA in the Court of Appeal case of *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256).

[40] Furthermore, the information contained in the brochure could not be said to have been incorporated as a term of the SPA since 'as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat ...' (per Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban & Ors* [2001] 4 MLJ 49).

[41] We were of the view that on the facts and the law, there was no firm promise by the appellant to construct the food court and the theme park and to ensure that these should continue to exist, no matter what the economic circumstances were. We were persuaded by the appellant's argument that the Fourth Schedule included in the 28 separate SPAs adduced do not uniformly depict the food court and/or the theme park as a contractual obligation to construct. A SPA involving a first floor unit will not include any area depicted as a food court, which is on the second floor. Nor would a SPA for a second floor unit show any area for a theme park, since the theme park will be on the third and fourth floors. On this basis, the argument that the representation in the advertisement brochure had been incorporated in the SPA by the inclusion of Schedule 4, was not convincing in law.

Whether the exemption clause in the brochure was effective in law to exclude liability for misrepresentation

[42] As for the legal bindingness of the representation in the advertisement brochure as a pre-contractual document, it was common ground that there existed an exemption clause, no doubt in the customary small print. As such the representations made should be read as mere 'puffs' and not binding promises. At most, these were in the nature of an invitation to treat (*Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban & Ors*). In this connection, the learned JC had also failed to evaluate this exemption clause leading to an error of law which again invited appellate intervention on our part.

Whether the respondents had pleaded fraudulent or negligent misrepresentation, or merely innocent misrepresentation, for which no damages were claimable

Whether there was a continued misrepresentation in newsletters published to the purchasers after the execution of the SPAs that the food court and the theme park would continue to be built

[43] The other representations made in the post-contractual newsletters too should remain as they really were, namely, representations without contractual effect made to the tenants of the said complex at large. There was no evidence of deceit or fraudulent misrepresentation in these circumstances.

[44] On the facts of this case, the respondents had been delivered the units they had purchased in the said complex, which were not structurally or fundamentally different from that promised in the SPAs, Fourth Schedule. The facts here were quite unlike the facts in *Balakrishnan a/l Devaraj*, an authority advanced by counsel for the appellant. *Balakrishnan a/l Devaraj* also laid down the principle that a party to an innocent misrepresentation can only resort to the remedy of rescission and restitution if the contract for sale of land remained executory in form and had not been fully executed. On the facts of this appeal, we were minded to find a case of innocent misrepresentation for which no damages would be claimable. The SPAs here too had all been fully executed and the properties delivered.

Whether the learned JC was correct in law to have ordered general and special damages to be assessed for both misrepresentation and breach of contract

[45] Counsel for the appellant submitted that the High Court order dated 28 July 2011 had ordered the appellant, inter alia, to pay:

(a) damages for the misrepresentations in the advertisement brochure and newsletters;

(b) damages for its breach of cl 39 and Schedule 4 of the SPA;

(c) special damages as pleaded in para 136 of the statement of claim to be assessed; and

(d) general damages to be assessed.

[46] Those prayers as stated above represent a quadruple claim in favour of the respondents because the wrongdoing complained of emanated from the same statement. This was the most obvious and blatant misunderstanding of the pleadings and evidence. The learned JC whilst ordering the appellant to pay special damages as prayed for in para 136 of the statement of claim, completely failed to provide any reason for the following relief in para 136 when he entered

judgment for the respondents. According to the appellant's counsel some of the matters pleaded in para 136 had been abandoned by the respondents. On 27 January 2011, during the case management before YA Dato' V T Singham, the respondents' counsel confirmed that they were only proceeding with reliefs (i), (iii), (xi) paras (i), (xix), (xx), (xxiii), (xxiv) and (xxv). On the other hand, para 136 of the statement of claim includes other claims which the respondents had decided not to proceed with.

[47] The law and the SPA do not justify such an award, made for para 136. Below are some of the items for which the respondents were claiming for and the appellant's response to them. The respondents' counsel confirmed, at the last hearing on 19 August 2014, that the respondents had abandoned the claim for liquidated and ascertained damages (LAD). On damages for breach of brochure and newsletters, the learned JC had already awarded damages both for misrepresentation and breach of contract, and general damages. On damages for misrepresentation, this had already been ordered separately. On reduction in the value of the property, the appellant submitted that it had already been ordered separately by way of general damages. On damages for breach of cl 4 (that time shall be of the essence), the appellant submitted that this did not entail to stipulate any obligation.

[48] Learned counsel for the appellant further submitted that the only evidence produced by the respondents to prove the amount of damages was the expert report. The learned JC had failed to analyse the reasoning of rival expert valuers and merely relied on the evidence of PW1. On the same point, the respondents had failed to specify with certainty whether their action for misrepresentation was one of negligent misrepresentation or fraudulent misrepresentation. As the respondents did not plead fraudulent misrepresentation, they would not be allowed to rely on any arguments relating to fraudulent misrepresentation (*Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460 (CA)).

[49] On the other hand, learned counsel for the respondents submitted that the learned JC had awarded damages to the respondents and assessment was to be conducted by the registrar. Learned counsel for the appellant had agreed and approved the draft judgment dated 28 July 2011 without any protest. Therefore to protest now that the learned JC had erred in awarding excess damages was baseless and devoid of merit. The respondents submitted that the Court of Appeal can vary the judgement to reflect the issues decided at the trial.

[50] We found that, in connection with the order on damages to be assessed granted by the learned JC, there were elements of duplicity. A plaintiff must in law decide whether he is pursuing a claim on misrepresentation or breach of contract. He is not entitled to be awarded damages both for misrepresentation

and breach of contract. Once a representation becomes a clause in the contract, such as argued here by the respondents, there could not therefore be an order for damages to be assessed for both misrepresentation and breach of contract.

Whether there was an agreement at case management to limit the number of witnesses for the respondents to merely two witnesses

[51] The appellant highlighted that this case involved more than 170 individual purchasers, the respondents have the burden to show that there were false positive assertions by the appellant which induced each of them to enter into their respective SPAs. In order to successfully claim that there was indeed misrepresentation by the appellant, each of the 176 respondents would have to come to court to give evidence to this effect, as each of the respondents' state of mind when signing the SPAs is distinct from one to the other. In *Dato' Badarudin bin Abd Khalid & Ors v MBf Property Services Sdn Bhd & Ors* [2011] MLJU 1256, it was held that the four plaintiffs who took the stand could not do so on behalf of the other plaintiffs as they were in no position to know the 'state of minds' of these plaintiffs at the time the decisions to sign up for the sale and purchase agreement and the loan agreements were made. Therefore, there was no evidence before the court to prove that the plaintiffs other than the four who had testified had been misrepresented to by the appellant.

[52] It was submitted that there were in total 176 respondents consisting of individuals and companies. However, counsel for the respondents had decided to use a selective approach by hand picking a particular individual to impress on the court on the issue of misrepresentation and conveniently gave evidence in court that the remaining respondents had authorised him to give evidence on their behalves without considering that the state of mind of each and every respondent before entering into the SPA was vital in a cause of action based on misrepresentation.

[53] Counsel for the appellant denied the allegation of counsel for the respondents that the appellant had during case management agreed to the calling of two witnesses. Counsel for the appellant referred to the notes of proceedings at p 878 AR *Bahagian* B *Jld* I where the respondents' counsel herself had maintained her stand on the issues and calling of witnesses and stated that it was the respondents' prerogative to decide on the number of witnesses and submitted that there was never an agreement by the appellant that PW1 was sufficient to tender evidence on behalf of all the remaining 175 respondents.

[54] Furthermore the evidence of PW1 was only relevant regarding the representation made to PW1.The evidence given by PW1 were either only facts

applicable to himself or facts in general which could not in any way prove that all the respondents were induced by the appellant's alleged 'misrepresentation' and his evidence that the other respondents too executed similar SPAs and deeds were highly inaccurate as it had already been established that Schedule 4 of each SPA differed from one to the other. The food court only appears in the second floor plan, the theme park in the third floor plan and neither facility appears in the first floor plan.

[55] It was further submitted that the respondent had failed to produce the authorisation letters authorising PW1 to give evidence. Despite the undertaking given by the counsel for the respondents to produce the said authorisation letter, they had failed to do so. Instead, several warrants to act were attached together with the written submissions of the respondents. Due to the failure by the respondents to produce the letter of authorisation/warrants to act during the respondents' case, the appellant was deprived of the right to cross-examine on the warrants to act. In addition, the warrants to act was not marked nor tendered as evidence.

[56] In reply, the respondents submitted that it was at the behest of the appellant that the two witnesses would give evidence on behalf of all the respondents at the trial. The counsel for the appellant in his letter had confirmed that only two witnesseswould give evidence on behalf of the other respondents. This was recorded before Justice V T Singham at the pre-trial conference on 27 January 2011. These two witnesses testified in court and the appellant did not lead any evidence or call any witnesses challenging the two witnesses' authorities.

[57] On the issue whether there was an agreement at case management stage to limit the number of witnesses for the respondents to two principal witnesses, we had studied the records and it would appear that there was such an agreement. Counsel for the respondents had reinforced this argument by highlighting to us that on the same basis, it was agreed that the decision in Suit No 145 was to bind Suit No 308. This agreement, to our minds, would only make some sense on the assumption that the alleged misrepresentations in the brochures, SPAs, and the newsletters acted uniformly on the minds of the purchasers. It would therefore appear that this assumption must have been implicit in the common understanding to limit the number of witnesses. Nevertheless, given our decision on the other legal issues, particularly on the issue of limitation, it no longer became important to decide whether by limiting the number of witnesses for the plaintiffs/respondents to two principal witnesses, the respondents had in fact adduced sufficient necessary and relevant evidence to establish misrepresentation and breach of contract, since misrepresentation would act differently on the minds of each of the 175 purchasers.

Whether the respondents had established their case based on misrepresentation and breach of contract by the evidence of only two purchasers as witnesses, although the claim is by 176 unit purchasers

Whether the first respondent had been properly authorised to act for the other 175 respondents by the warrants to act produced in court at the submission stage in the High Court

[58] The appellant submitted that without prejudice to their objection that the warrants to act could be considered by the Court of Appeal, the appellant highlighted the following defects in the warrants to act:

(a) 15 respondents are companies. However, since the cause of action was misrepresentation, it was uncertain as to how representation was even made to that particular company, that is, to which officer or director;

(b) the 79th respondent is deceased. There was no evidence whether the authorisation was given by him before his demise or by his administrator after his demise;

(c) only 101 respondents out of 176 plaintiffs signed the warrants to act; and

(d) not all the respondents authorised PW1 but instead authorised the solicitors (refer to pp 2276, 2347 and 2360 of the *rekod rayuan tambahan* (3)).

Hence, it was impossible for PW1 to say for certain that there was misrepresentation to and reliance on such misrepresentation by each and every respondent. Furthermore there was no evidence in court to show that each and every respondent was given the advertisement brochure and had read it, and relied and executed their respective SPAs upon the representation by the appellant.

[59] With regard to the allegedly unsatisfactory nature of the status of the first respondent to represent the rest of the respondents, we had been shown copies of the warrants to act, which were only produced during the submissions stage in the High Court. These warrants did not speak of authorising the first respondent to give testimony on behalf of all other respondents. In the total circumstances again, this was not an overly major point that could be regarded as determinative of this appeal. All said and done, the other respondents or any of them had not raised any objection to the first respondent representing them. The point was now being taken as really a subsidiary and lesser ground by the appellant, more as a technical point rather than a substantive issue. Given the existence of the agreement at case management to limit the number of

witnesses, it would have been more prudent for the appellant to have taken up this issue of warrants to act at the earlier stage.

CONCLUSION

[60] In the premises above, we unanimously allowed this appeal. The order of the High Court dated 26 April 2010 was set aside. We awarded costs of RM30,000 here and below to the appellant.

[61] The deposit was to be refunded to the appellant.

Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar